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No. 82-

IN THE

Supreme Court of the United States

October Term, 1982

JOSEPH J. IMHOFF and ESTATE OF EDITH M. IMHOFF, Deceased, JOSEPH J. IMHOFF and AMERICAN SECURITY BANK, N.A., Co-Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Do not the federal courts have a duty, upon discovering that an attorney for the Internal Revenue Service avoided entry of judgment against the government and in favor of taxpayers by means of a fraud perpetrated on the court, to open the judgment later entered against taxpayers?

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OPINIONS BELOW

The Court of Appeals for the Third Circuit issued a judgment order, but no opinion, in this case. The Order is reprinted in the Appendix at p. A1. The Tax Court filed its Memorandum Findings of Fact and Opinion on January 31, 1980, which is reported at 39 T. C. M. (CCH) 978 (A6).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on July 30, 1981. A timely petition for rehearing was denied on August 24, 1982, and this petition was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. § 1254(1) and 28 U. S. C. § 2101(c).

STATEMENT OF THE CASE

Petitioners commenced this action in the United States Tax Court by Petition filed on January 13, 1977, in response to an Internal Revenue Service Notice of Deficiency in income taxes served on Colonel Joseph J. Imhoff and Edith M. Imhoff, his wife, for the taxable year ended December 31, 1973. Edith M. Imhoff, co-petitioner at the inception of this action, died on April 1, 1980, prior to the rendering of the decision and the entry of a final order by the Tax Court, and the caption was changed to make the Estate of Edith M. Imhoff and its co-executors, Joseph J. Imhoff and American Security Bank, N.A., additional petitioners.

The matter was originally scheduled for trial on February 21, 1978 before the Honorable William H. Quealy. When it appeared that the parties were unable to reach an agreement as to a stipulation of pertinent facts in preparation for trial, as required by Rule 91(a) of the Rules of Practice and Procedure of the United States Tax Court, the Commissioner filed a Motion for an order to show cause why the stipulation of facts proposed by the Commissioner should not be adopted. On February 1, 1978 Judge Quealy heard argument on this Motion. After hearing Colonel Imhoff's objections to the Motion, Judge Quealy, declaring that he was "not going to sit down there and work out of a shoebox" (A46), warned the parties that:

> "without a stipulation of fact and without the parties working toward accomplishing that, the Court intends to dismiss this proceeding one way or the other, either in favor of party A or party B, whichever the party is at fault."

(A44).

Specifically, Judge Quealy ordered the Imhoffs to produce for the Commissioner whatever evidence, segregated by expense category, they intended to offer at trial in support of the disputed deductions no later than February 10, 1978. (A43, A45). The court further expressly stated that if the material was delivered to the Government's attorney, Mr. Stewart, by the date ordered, the Imhoffs would have discharged their responsibility. (A43). Once delivery was completed, the court continued, the Commissioner's counsel was to look the material over and put it into proper form for stipulation. (A45). Judge Quealy gave Mr. Stewart until February 17, 1978 to complete this task, and ordered him to report to the court on that day as to whether the stipulation was ready. (A47). Colonel Imhoff's request to also appear at that time was denied. (A39). However, Judge Quealy assured Colonel Imhoff that "if Mr. Stewart is dilatory I'll default him just as quickly as I'll default you." (A45).

The Imhoffs complied fully with Judge Quealy's directive and discharged their obligation in connection with preparation of the stipulation. (A39). Counsel for the Commissioner, on the other hand, did not fulfill his obligation, having failed to complete the written stipulation as required. To prevent the entry of a default judgment in favor of petitioners, Mr. Stewart appeared at the call of the list on February 15th, in petitioners' absence, and lied to Judge Quealy, stating that Colonel Imhoff had requested a continuance due to illness of Mrs. Imhoff. (A51). In fact, Mrs. Imhoff was not then ill, and Colonel Imhoff had never asked Mr. Stewart to request a continuance. (A40). Based upon counsel's knowing misrepresentation, Judge Quealy granted the continuance without further inquiry. (A5).

Colonel Imhoff did not learn of the Government counsel's willful deception until more than eleven months later, on January 30, 1979, and was unable to obtain a

copy of the transcript of the February 15, 1978 proceedings until February 26, 1979. Petitioners presented motions, pre-trial and post-trial, to Judge Irene Scott of the Tax Court, to whom the case had been reassigned for trial, asking that judgment be entered against the Commissioner for the failure of counsel to comply with Judge Quealy's order of February 1, 1978. (A52-A53, A54-A55). Judge Scott denied these Motions, stating that it had been up to Judge Quealy to dismiss the case and that since he had not done so, she found no ground for dismissal. (A53, A55). Judge Scott reached this decision despite petitioners' assertions that Judge Quealy's decision not to dismiss the case was based upon the fraudulent statement of the Commissioner's counsel, and despite the ending of Judge Quealy's involvement with the case after granting the continuance and before petitioners were able to learn of the fraud.

The matter was tried before Judge Scott on January 31 and February 1, 1979 and, on January 31, 1980, Judge Scott filed her Memorandum Findings of Fact and Opinion. (A6).

Petitioners thereafter filed with the Tax Court a Petition for reconsideration of the court's ruling on petitioners' earlier Motions, with accompanying affidavit of Colonel Imhoff setting out the facts concerning the government attorney's egregious conduct. (A36). Judge Scott dismissed the Petition without a hearing within one day, and on September 9, 1981 entered a decision finding a deficiency in the amount of $6,675. (A31).

The court of appeals affirmed without opinion, and denied petitioners' Petition for Rehearing (A1, A34), in both cases over argument that the government attorney's perpetration of a fraud upon the court in order to avoid the sanction of Judge Quealy constituted grounds for dismissal of the deficiency assessment entered by the Tax Court or, in the alternative, for remand for an evidentiary hearing on the matter.

REASONS FOR GRANTING THE WRIT

The Decision Below Conflicts With the Decisions of This Court and of Numerous Other Circuits and Raises an Important Question of Federal Law

This Court, in *Hazel-Atlas v. Hartford Co.*, 322 U. S. 238 (1944), vacated the judgment of the Third Circuit there appealed from based upon appellant's showing of a fraud perpetrated upon the trial court under the direction of appellee's attorney. In the course of its opinion, the Court stated that:

> [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society.

Id. at 246. Petitioners here seek review of the Tax Court and Court of Appeals for the Third Circuit's complacent tolerance of the fraud committed by the Government's attorney in this case.

The fraud here in question took the following form. Judge Quealy of the Tax Court ordered the Government's attorney, in no uncertain terms, to prepare for stipulation the documentary evidence produced and categorized by petitioners by February 17, 1978 or else suffer dismissal. As noted by the court in *United States v. An Undetermined Quantity*, 583 F. 2d 942 (7th Cir. 1978), the duty of compliance with the orders of courts "is particularly important when Government officers are involved, for '[t]he greater the power that defies the law the less tolerant can this Court be of defiance.'" *Id.* at 949, quot-

ing *United States v. United Mine Workers*, 330 U. S. 258, 312 (1947).

Attorney Stewart not only failed to comply with the Tax Court's Order, he perpetrated a fraud upon the court in order to conceal that fact. Without any foundation in fact or authority to do so, Stewart represented that it was petitioners, not he, that were out of compliance and who therefore requested a continuance. Such conduct by a government official, perhaps especially where the Internal Revenue Service is concerned, must not be condoned. *See, e.g., Birnholz v. United States*, 199 Ct. Cl. 532 (1972) ("Members of the public, who must turn square corners in tax matters, demand no less of revenue officials." *Id.* at 537).

The fraudulent conduct described above contains those two factors which formed the basis for this Court's decision in *Hazel-Atlas*. There, the fraud complained of was not merely a matter between two private parties in that it invoked the public's interest in the operation of the U. S. Patent Office. This fact heightened the Court's concern with the integrity of the judicial proceeding under review. *Hazel-Atlas v. Hartford Co.*, 322 U. S. at 246. The instant case is likewise not just a private dispute, as the public clearly has a strong interest in the dishonesty of an official of the Internal Revenue Service testifying in a court of law.

As to the second factor, Professor Moore, analyzing the *Hazel-Atlas* decision, notes that the fraud in that case did not clearly influence the outcome so that the case is not easily distinguished from cases where the Court has denied relief. 7 J. MOORE FEDERAL PRACTICE ¶ 60.33 (2d ed. 1982). Moore concludes, however, that the distinction lies in the fact that in *Hazel-Atlas*, as in this case, an attorney was implicated in perpetrating the fraud. This is important, Moore believes, for:

> an attorney is an officer of the court . . . . [H]is loyalty to the court, as an officer thereof, demands integrity and honest dealing with the court. And when he departs from that standard in the conduct of a case he perpetrates a fraud upon the court.

Id. at 513.

Based on his reading of *Hazel-Atlas*, Moore offers a definition of "fraud upon the court" which encompasses fraud perpetrated by officers of the court. Moore's definition has been expressly adopted in a number of jurisdictions. *See, e.g., Kerwit Medical Products, Inc. v. N & H Instruments, Inc.*, 616 F. 2d 833, 837 (5th Cir. 1980); *H. K. Porter Co. v. Goodyear Tire & Rubber Co.*, 536 F. 2d 1115, 1119 (6th Cir. 1976); *Wilkin v. Sunbeam Corp.*, 466 F. 2d 714, 717 (10th Cir. 1972), *cert. denied*, 409 U. S. 1126 (1973); *Kupferman v. Consolidated Research and Manufacturing Corp.*, 459 F. 2d 1072, 1078 (2d Cir. 1972); *Kenner v. Commissioner of Internal Revenue*, 387 F. 2d 689, 691 (7th Cir.), *cert. denied*, 393 U. S. 841 (1968); *Great Coastal Express v. International Brotherhood of Teamsters*, 86 F. R. D. 131, 138 (E. D. Va. 1980) (District Court, finding no Fourth Circuit opinion on the question, adopts Moore's definition, satisfied that the Circuit Court would find Moore's discussion persuasive).

The Third Circuit, by failing to accord petitioners the relief requested, has effectively rejected the position taken by those circuits listed above that dishonesty of an attorney, by definition, constitutes a fraud upon the court.[1] The clear conflict presented here, providing this

1. Petitioners, in their Brief below, stated to the Third Circuit that it had specifically adopted Professor Moore's formulation in *Stickler v. Commissioner of Internal Revenue*, 464 F. 2d 368 (3d

Court with the opportunity to clarify the scope of its holding in *Hazel-Atlas*,[2] warrants the grant of certiorari to review the judgment below.

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1. (Cont'd.)

Cir. 1972) (court concludes appellants failed to demonstrate fraud upon the court). The Third Circuit's decision in this case, however, suggests that the court has reversed or narrowed its position on the issue. The Third Circuit's ruling in *Hazel-Atlas*, reversed by this Court, and in the instant case indicate that this circuit continues to adhere to a standard different from that of this Court and of the other circuits for finding fraud upon the court.

2. The recent decision of the Utah District Court in *Bulloch v. United States*, No. C-81-0123C (D. Utah Aug. 4, 1982) underscores the need for such clarification. Although ultimately granting plaintiff sheep ranchers relief from a 26 year old judgment on the basis of findings that the judgment was obtained by fraud on the part of government agents, the court states that "[f]raud upon the court is a nebulous concept," and notes Professor Moore's contention that *Hazel-Atlas* expanded the traditional fraud on the court concept. *Bulloch v. United States* at 54-55.

CONCLUSION

Accordingly, the petitioners, Joseph J. Imhoff and Estate of Edith M. Imhoff, Joseph J. Imhoff and American Security Bank, N. A., co-executors, respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding July 30, 1981.

Respectfully submitted,

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IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 82-3004

JOSEPH J. IMHOFF and ESTATE OF EDITH M. IMHOFF, DECEASED, JOSEPH J. IMHOFF and AMERICAN SECURITY BANK N.A. CO-EXECUTORS,

Appellants

v.

COMMISSIONER OF INTERNAL REVENUE
(T.C. No. 441-77)

ON APPEAL FROM A DECISION OF THE UNITED STATES TAX COURT

Submitted Under Third Circuit Rule 12(6)
July 29, 1982

Before: GIBBONS and HUNTER, *Circuit Judges* and POLLAK, *District Judge* *

JUDGMENT ORDER

Joseph J. Imhoff and the Estate of Edith M. Imhoff, deceased, appeal from a decision of the Tax Court deter-

* Hon. Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

mining a deficiency in their 1973 federal income tax in the amount of $6,675. They contend that the deficiency should be dismissed because the attorney for the Internal Revenue Service obtained a continuance by a misrepresentation to the court. The Tax Court did not abuse its discretion in denying taxpayers' motion.

It is ORDERED and ADJUDGED that the decision of the Tax Court be and is hereby affirmed. Costs are taxed in favor of appellee.

By THE COURT,

/s/ JOHN J. GIBBONS
John J. Gibbons,
Circuit Judge

Attest:

SALLY MAVOS, Clerk
DATED: JUL 30 1982

IN THE
UNITED STATES TAX COURT
WASHINGTON, D. C.

Docket No. 441-77

JOSEPH J. IMHOFF and EDITH M. IMHOFF

v.

COMMISSIONER OF INTERNAL REVENUE

ORDER

WILLIAM H. QUEALY, *J.* February 1, 1978

This case was called from the calendar for the Motions Session of the Court at Washington, D.C. on February 1, 1978 pursuant to the Court's order to show cause dated December 22, 1977. Petitioner Joseph J. Imhoff and counsel for respondent were heard. After due consideration, and for cause appearing in the transcript of the proceedings, it is

ORDERED that the petitioners are directed to produce petitioners' records for the respondent before 3:00 p.m. on February 10, 1978 for the purpose of preparing the stipulation of facts in accordance with Rule 91(f) of the Tax Court's Rules of Practice and Procedure. Those records should consist of all documentary evidence that petitioners intend to introduce into evidence to substantiate the miscellaneous deductions, in the amount of $18,214.00, taken by petitioners for the taxable year 1973, which is the year at issue in this case. The records are to be segregated as to the amounts paid, to whom the payments were made,

and stating what the payments were made for. It is further

ORDERED that respondent shall report to this division of the court before noon on February 17, 1978, as to the whether a stipulation of facts has been prepared and if this case is ready for trial. In the event the case is properly prepared for trial the case will be tried on February 21, 1978 at a time to be set by the Court. If the case is not ready for trial, the Court will take further action as it deems appropriate. It is further

ORDERED that action on the Court's Order to Show Cause dated December 22, 1977 will be held in abeyance pending respondent's report on February 17, 1978.

/s/ WILLIAM H. QUEALY, *J.*

IN THE
UNITED STATES TAX COURT
WASHINGTON, D. C.

Docket No. 441-77

JOSEPH J. IMHOFF and EDITH M. IMHOFF

v.

COMMISSIONER OF INTERNAL REVENUE

ORDER OF CONTINUANCE

WILLIAM H. QUEALY, *J.* February 15, 1978

This case was recalled for trial on February 15, 1978 at Philadelphia, Pennsylvania, at which time counsel for respondent orally moved the Court for a continuance. After due consideration and for cause appearing in the transcript of the proceeding, it is

ORDERED that respondent's oral motion is granted and this case is continued generally,

/s/ WILLIAM H. QUEALY, *J.*

IN THE
UNITED STATES TAX COURT
WASHINGTON, D. C.

DOCKET NO. 441-77

JOSEPH J. IMHOFF and Estate of EDITH M. IMHOFF, Deceased, JOSEPH J. IMHOFF and AMERICAN SECURITY BANK N.A., Co-Executors

v.

COMMISSIONER OF INTERNAL REVENUE

MEMORANDUM FINDINGS OF FACT AND OPINION

IRENE F. SCOTT, *J.* January 31, 1980

Respondent determined a deficiency in petitioners' income tax for the calendar year 1973 in the amount of $8,978. The issue for decision is the amount of the deduction to which petitioners are entitled for (a) expenses for the production and conservation of income, (b) legal expenses, (c) investment expenses, (d) travel expenses other than by automobile, (e) purchase of books and publications, (f) entertainment, and (g) payments made to organizations.[1]

1. Initially, there was an issue with respect to the amount of deduction to which petitioners were entitled for automobile expenses, but on brief respondent conceded that petitioners were entitled to deduct the entire $1,426 claimed by them on their return for such expenses.

Findings of Fact

Some of the facts have been stipulated and are found accordingly.

Petitioners, husband and wife, who resided at Merion Station, Pennsylvania, at the time of the filing of their petition in this case, filed a joint Federal income tax return for the calendar year 1973 with the District Director of Internal Revenue, Philadelphia, Pennsylvania.

Joseph J. Imhoff is a retired Army Colonel. He and Mrs. Imhoff during the years here in issue and for a number of years prior thereto resided in a large home on over three acres of ground at Merion Station, Pennsylvania. During the year here in issue and for a number of years prior thereto, petitioners have owned commercial real estate located in Washington, D. C. and Arlington County, Virginia. The day-to-day management of this property was handled for them by H. G. Smithy Co., Washington, D. C. However, petitioners consulted with representatives of H. G. Smithy Co. about the management of the property and made the final decisions themselves on most items respecting the leasing of space and major repairs or renovations on their property. During 1973 petitioners also owned a commercial property in Philadelphia, Pennsylvania.

Petitioners owned an extensive portfolio of stocks and bonds from which they received dividend and interest income. During the year 1973 they made sales of stock in 15 different companies. Included in the stock sold were shares of Toyota Motors, Ltd., Japan Airlines, and Tubos de Acero de Mexico. Petitioners also had capital gains distributions from 9 other stocks. In managing their stocks and bonds it was necessary for petitioners to consult with brokers, to take stock certificates to and from their safe deposit boxes and to enter their safe deposit boxes to

clip coupons. Petitioners received $30,783 in dividends in 1973 and $31,099 in interest.

Petitioners had no office space outside their home. Petitioners' home consisted of 15 rooms and 2 other areas which though not enclosed were room size, 6 bathrooms, a furnace room, a room for the water heater, a loft, 2 large hallways on the first floor and second floor hallways. On the ground floor, in addition to the furnace room, water heater room and laundry room, was a large room and a smaller room. On the first floor was a 22 x 44 foot living room, a large room which had at one time been used as the family dining room, a 16 x 14 foot room which had at one time been used as a breakfast room but which was used by petitioners as their dining room, a large kitchen, another large room which had bookshelves and had been used as a library, and a smaller first floor room toward the front of the house. The second floor contained the master bedroom suite which had a separate dressing room-study, two other bedrooms and another suite which consisted of a bedroom and attached dressing room. Each of these four rooms on the second floor had a bath. There was another room on the second floor, a large open space, a number of storage rooms and a number of closets. One of the six baths was on the ground floor next to the laundry room and one on the first floor next to the small room toward the front of the house.

The hallways were furnished primarily with cabinets in which petitioners kept a collection of Worcester ceramics and other porcelains, including Boehm birds. On the large stairway landing was an ornamental cabinet in which petitioners kept papers. There were also chairs in the hallways. In the large ground floor room Col. Imhoff had a desk. In that room there were also two tables. Mrs. Imhoff at times used one of the tables to work on the preparation of income tax returns. There were also two type-

writers in the large ground floor room. In the smaller ground floor room there was a table and an adding machine. The smaller room toward the front of the house on the third floor was used by Mrs. Imhoff as an office. She had a desk and files in that room. The room on the first floor that had bookshelves and had at one time been used as a library was used by Col. Imhoff during 1973 for reading. There was a telephone and television in that room. In the room on the first floor that had at one time been used for a dining room was a big table. Col. Imhoff had materials with respect to his income tax stacked on this table and in other parts of the room. That room was used in 1973 by petitioners as a room in which to keep income tax material and for Col. Imhoff to work on income tax matters. Mrs. Imhoff did not use this room. On the second floor there was a room which Col. Imhoff considered as his regular office. He had file cabinets and files in that room, a telephone and table where he kept stationery and supplies and a typewriter. There was also a television in this room. In addition, there was an open space on the second floor larger than an average room where petitioners had two tables that sometimes were used by Mrs. Imhoff. One of the storage rooms on the second floor was used for storage of files. There were two telephones and a television in the master bedroom and a small television in the kitchen. However, generally when petitioners would watch television it would be in the downstairs room that had been a library. Generally when a broker or someone came to the house to discuss a sale or purchase of stock or other matters with petitioners the first floor room used by Mrs. Imhoff as an office would be the place in which the discussion would take place, but occasionally such matters would be discussed in petitioners' living room.

During 1973 petitioners spent $756 on books and publications. Included in these expenditures were the following items:

America's Future	$25
American Historical Association	2
American Opinion	30
Arts of Asia	9
Brooklyn Botanical Plants and Garden	7
Christian Crusade Weekly	15
Gourmet	13
Independent American	50
Manion Forum Reports	50
McCall's	6
National Geographic	8
National Observer	3
Newsweek	10
Kanzinger Home News Service	94
Phyllis Schafley	10
Reader's Digest	14
Review of the News	10
Salvation Army	8
Saturday Evening Post	8
Yankee Magazine	4
Worcester Porcelain books	48
Superintendent of Documents Military Book	5
Public Broadcasting Service	50
National Geographic Society Book	8
Books purchased at various book fairs	99 [2]

2. Also included in this $756 were amounts totaling $171 which petitioners spent for Barrons, Eagle Trust Fund, Financial World, Lasser's Tax Service, Dow Jones Publications tax book, Wall Street Journal, New York Times, Fortune, and three tax books. Respondent has conceded that these amounts are all properly deductible. The total amount is stipulated to be $756. However, the addition of the individual items stipulated total $757.

In 1973 petitioners paid a fee for tax assistance in the Commonwealth of Virginia of $208.65, a fee for filing a petition with this Court of $10, and $18 for photocopying and mailing documents to this Court and to respondent.[3]

During 1973 petitioners paid $662 to various organizations. Included in these amounts were payments to the following:

University Club of Washington	$78
Retired Officers' Association	4
Merion Garden Club	56
Committee for Conservative Action	5
East African Wild Life Society	10
English Ceramics Study Group	30
Purdue Alumni	50
Committee on Pan American Policy	25
Bala Cynwyd Narberth Rotary	82
Institute for American Strategy	25
Geographical Society of Philadelphia	45
Firearms Lobby	15
American Security Council	40
Sigma Delta Chi	13
Council Against Communist Aggression	15
League of Republican Women	5
Women's Club of Bala Cynwyd	17
Women's Board of Lankenau Hospital	16
Volunteer Medical Service Corp.	5
Union Fire Association	10
National Right to Work Council	25
Freedom's Foundation	10
Botanical Society of Merion	25
New Jersey Professional Engineers	5
Americans for National Security	25

3. Respondent has conceded that these amounts are properly deductible.

The Volunteer Medical Service Corp. was a volunteer rescue squad in the Merion area and the Union Fire Assn. was a volunteer fire organization.[4]

During 1973 petitioners expended the following amounts with respect to investments:

RHM Warrant and Stock Survey	$ 95.00
Wall Street Transcript	125.00
Charge for a foreign certificate	5.00
Publication by New York Stock Exchange	7.50
Indicator Digest	78.00
International Investment Advisor	36.00
Three safe deposit boxes	42.00
Investment Seminar	50.00
Institute for International Research	252.00
Value Line Investment Service and Standard and Poor's International Stock Reports	445.00
Photocopying and mailing	23.00[5]

In addition to the above amounts petitioners spent (1) $60 for a large safe deposit box in Philadelphia and $24 for a box in Bala Cynwyd in which they kept stocks and bonds, and (2) $100 in establishing a petty cash fund for expenses involved for civil litigation instituted by petitioners and others as shareholders against the Provident Fund for Income for fraud that the shareholders claim was perpetrated against them by directors of the Provident Fund for Income.

On January 8 and 26, February 8, 16, 19, 23 and 26, March 7, 9, 12, 14 and 30, April 16, May 1 and 27, June 27,

4. Also included in the $662 was $10 paid to the Smithsonian Institute and $16 paid to the National Wildlife Federation. Respondent concedes that this $26 is deductible.

5. Respondent has conceded that these items, totaling $1,158.50, are properly deductible by petitioners as investment expenditures.

July 24 and 27, August 3, 15, 16, 20, 22, 27, 28 and 30, September 5, 25 and 26, October 1, 9 and 24, and November 6 and 19, Col. Imhoff made trips by public transportation from his home to Philadelphia, Pennsylvania. On 14 of these 34 trips, Col. Imhoff traveled to Philadelphia so that he could place in or remove securities from petitioners' safe deposit box at the First Pennsylvania Bank. On 10 of these occasions Col. Imhoff traveled to Philadelphia for conferences concerning Federal tax litigation or concerning his Federal income tax liability for 1971. Expenditures made by Col. Imhoff for cab fares and lunches relating to these trips totaled $29. On 8 of the occasions that Col. Imhoff traveled to Philadelphia in connection with Federal tax litigation or concerning his Federal income tax liability for 1971, he departed from Philadelphia for either Wilmington, Delaware or Washington, D. C. Litigation was taking place in Wilmington, Delaware involving Imperial Jade, a partnership in which petitioners had invested. Petitioners were attempting to recover assets they claimed were fraudulently taken by other parties. Petitioners expended the sum of $183 in 1973 for travel involving litigation for Imperial Jade. On one occasion during 1973 Col. Imhoff traveled to Washington, D. C. in connection with petitioners' commercial property in the Washington, D. C. area at a cost of $33.[6]

On March 14, 1973, petitioners hosted a party for their English Ceramic Study Group at their residence. The curator of the Royal Worcester Porcelain Company

6. Of the amounts listed above, respondent concedes that $28 ($2 per trip) is deductible for the cost of the 14 trips Col. Imhoff made from his home to Philadelphia to place securities in or remove them from petitioners' safe deposit box; that $4 for the 2 trips to the Internal Revenue Service when Col. Imhoff did not proceed to either Wilmington or Washington is deductible; and that the $33 spent to go to Washington, D. C. is deductible.

Museum of England was the guest speaker and approximately 40 guests were present. On April 21 and 22 petitioners spent $30 for Easter baskets and gifts for their employees. On June 18 they spent $19 for tickets to the Theater Guild which were given to Naomi Dept. On October 26 petitioners purchased pecans for $43 which were given to the St. John's Convent, P. C. Ayres, Jean Koons and Frank Fisher. On December 20, 1973, petitioners purchased Christmas gifts from John Wanamakers which were given to M. M. Nicholson ($13), M. H. Groves ($11.50) and Frank Fisher ($19.50). On December 28, 1973, petitioners paid caterer Posey Roher $30 to cater a party at their residence. On six occasions during 1973 petitioners hosted at their home a meeting for dissatisfied shareholders of the Provident Fund for Income. On January 2, 1973, petitioners hosted a conference to discuss the Imperial Jade matter and also during 1973 hosted a dinner conference for a retiring friend and provided some refreshments for the friend's retirement party. Petitioners in 1973 attended three conferences in Philadelphia concerning the Provident Fund for Income. In 1973 petitioners gave liquor purchased for $25 to John Devine and liquor purchased for $12 to Thomas J. Owens.

During 1973 petitioners employed Naomi Dept. Mrs. Dept lived in petitioners' home in the suite consisting of a room, dressing room and bath on the second floor. She was a housekeeper for petitioners. She did the cleaning, some of the cooking, answered the telephone and door and if petitioners were not available took the message. Mrs. Dept also acted as a chauffeur for Mrs. Imhoff. She would drive Mrs. Imhoff to the bank when Mrs. Imhoff had business to transact or to other business appointments and would also drive Mrs. Imhoff to such places as the grocery store and to various meetings. Petitioners furnished Mrs. Dept with the suite on the second floor, all of her meals,

and paid her a cash salary of $3,900 in 1973. Petitioners also gave Mrs. Dept a $50 chapel gift and certain other presents during the year 1973.

Petitioners employed Eullia Whiting as a laundress during the year 1973. Her wages were $455. Petitioners employed Walter Whiting as a house handyman to do the heavy cleaning and paid him wages during 1973 of $230.

During 1973 petitioners expended for provisions $4,242.68. These expenditures consisted primarily of payments for food consumed in petitioners' household. However, it also included various household items purchased at grocery stores such as household supplies for cleaning. During 1973 petitioners expended for other household items, such as trash bags, paper napkins, drycleaning, paper towels and minor repairs, a total of $693.37. During 1973 petitioners expended for utilities a total of $3,275.09. Petitioners purchased candies and nuts during 1973 for a total amount of $267.49.

During 1973 petitioners made department store expenditures for various items used either by them in connection with their investment activities or in their household totaling $2,790.15. Included in this amount were such items as silver plates, 12 Christmas plates, chinaware, silver plate pan, plants and garden supplies and various household items. Also included in these department store expenditures were the following:

Date of Purchase	*Department Store*	*Item*	*Amount*
Jan. 3	Gimbels	Office supplies	$11.13
Jan. 19	Wanamakers	Stationery	23.00
Feb.23	Wanamakers	Stationery	14.74
July 23	Lord & Taylors	Stationery	14.84

During 1973 petitioners expended in connection with upkeep on their house and grounds $4,195.42. This expenditure was primarily for labor in maintaining the grounds of petitioners' house, various supplies for the garden and lawn, and garden tools and plants. However, it also included such items as plumbing repairs in the house and painting of the house.

During 1973 petitioners made miscellaneous expenditures in connection with their home and their investment transactions of $3,883.32. These expenditures included social security tax paid for Naomi Dept of $67.60 on January 16, 1973, $93.26 on April 19, 1973, $93.26 on July 18, 1973, and $93.26 on October 25, 1973. It also included the following amounts of United States postage paid on the dates indicated:

Jan. 2	Postage	$3.57
Feb. 5	Certified mail (H. G. Smithy)	1.35
Feb. 12	Stamps and stamped envelopes	5.00
Feb. 20	Certified mail (H. G. Smithy)	1.00
Mar. 5	Stamps	7.80
	Registered mail	1.78
Apr. 19	Certified mail (Va. tax return)	1.00
May 3	Registered letter	1.18
May 30	Stamps	14.00
	Certified mail (H. G. Smithy)	1.78
June 4	Registered mail (H. G. Smithy)	2.00
June 13	Certified mail	1.00
June 30	Registered letter (I. R. S.)	1.84
July 2	Certified letters (2)	2.00
July 12	Rent—P. O. Box	10.80
July 27	Photostat of telegram to IRS	2.00
Sept. 4	Certified mail (I. R. S.; H. G. Smithy)	4.00
Oct. 15	Certified mail	1.00

Also included were such items as luncheons for Mrs. Dept and expenditures at white elephant sales. Other expenditures included were payments for public liability insurance of $414, homeowners insurance of $859, general liability insurance of $285 and such items as flowers, insurance on silver, and photocopying.

Depreciation applicable to petitioners' entire house for the year 1973 was $2,552.

Petitioners on their Federal income tax return for the calendar year 1973 claimed under "Miscellaneous Deductions" a total amount of $18,214 composed of the following:

Autos (2)	$ 1,426
Books & Publications	911
Entertainment (Business)	475
Production and Conservation of Income	12,500
Investment	1,387
Legal	400
Organizations	665
Travel (other than auto)	450

Respondent in his notice of deficiency disallowed the claimed miscellaneous deductions in full on the ground that petitioners had failed to substantiate any amount of the claimed deductions.

Opinion

Petitioners' contention is that they are entitled to all the deductions claimed by them either as business expense deductions under section 162, I. R. C. 1954,[7] or deductions

7. All section references are to the Internal Revenue Code of 1954, as amended and in effect in the year in issue, unless otherwise stated.

for the production of income or conservation of income-producing property under section 212. It is respondent's position that petitioners were not in any business and that any deductions to which they are entitled would necessarily be deductions under section 212 relating to expenditures for the production of income.

There is insufficient information in this record to determine whether petitioners' ownership and the part of the management they did on two commercial properties in the Washington, D. C. area and the one commercial property in Philadelphia were sufficient to constitute a business. However, in the ultimate determination of this case this lack of evidence is unimportant since clearly the commercial properties were held by petitioners for the production of income and petitioners' activities with respect to their stocks and bonds were activities for the production of income. For this reason, petitioners are entitled to deduct the amounts they can show are ordinary and necessary expenses proximately related to the production of income from the commercial real estate they owned or from their stocks and bonds. *Bingham's Trust v. Commissioner* [45-2 USTC ¶ 9327], 325 U. S. 365 (1945). The income from investments includes rental, dividends, interest and receipts from sales. It is therefore necessary for us to determine to what extent petitioners have substantiated their claimed deductions and what amount of these claimed deductions are ordinary and necessary expenses proximately related to their income-producing activities.[8]

Petitioners have failed to show that they paid any legal expenses in the year 1973 other than the $236.65 conceded by respondent to be deductible. As previously

8. Col. Imhoff refused to permit the Revenue agent to examine his books and records for 1973, which caused respondent to disallow all petitioners' claimed "Miscellaneous Deductions" for lack of substantiation.

stated in a footnote, respondent has now conceded the deductibility of the entire $1,426 claimed as automobile expenses. Of the claimed deductions of $1,387 of investment expenses, petitioners have established that they expended the amount of $1,342.50 and respondent has conceded the deductibility of $1,158.50 of this amount. Of the $184 that petitioners have shown to have been expended as investment expenses which respondent has not conceded, we hold that the amount of $84 paid for the two additional safe deposit boxes is deductible. The evidence shows that stocks and bonds were kept in these boxes. Respondent's position seems to be that three safe deposit boxes were enough for petitioners. However, Col. Imhoff testified that petitioners had numerous stock certificates and bonds. In our view, the extra two safe deposit boxes were not excessive. We accept Col. Imhoff's testimony that these two additional safe deposit boxes contained income-producing stocks and bonds and hold the $84 rental fee to be deductible.

The record is too sketchy with respect to the $100 contributed by petitioners to a petty cash fund in connection with litigation instituted by stockholders against the Provident Fund for Income to show the reason for the payment. Therefore, petitioners have not carried their burden of proof to show this item deductible.

With respect to travel expenses, other than automobile, of $450, respondent has conceded that $65 is deductible. Petitioners have either not substantiated the remainder of this amount or have failed to show the connection of the amount with any activity geared toward the production of income. There is insufficient evidence to show whether the trips Col. Imhoff made to Wilmington in connection with certain suits were items which are deductible. See *Dyer v. Commissioner* [Dec. 24,869], 36

T. C. 456, 464-465 (1961). Because of petitioners' failure of proof, we hold none of the amount claimed as travel, other than auto, except the $65 conceded by respondent, to be deductible.

Of their claimed deduction of $911 for books and publications, petitioners have substantiated the expenditure of the amount of $756. Respondent has conceded that $171 of this amount is deductible. In our view, petitioners have failed to show that any of the publications which respondent has not conceded to be deductible are sufficiently related to the production of income or the conservation of property held for the production of income to be properly deductible. Petitioners' position is that anything they learned from any of these publications might in some way aid then in connection with their income-producing activities. Col. Imhoff, for instance, testified that they had investments throughout the world and therefore any magazine dealing with activities anywhere in the world assisted them in their production of income. Col. Imhoff testified that they were very interested in porcelain and collected it and therefore the cost of a magazine with respect to procelain should be deductible by them since at some time they might decide to sell some of their porcelain. In our view, this testimony does not show that any of these magazines were sufficiently connected with petitioners' production of income activities to be deductible.

Petitioners deducted $475 for business entertainment. The record totally fails to show sufficient connection of any of the expenditures for entertainment included in the claimed deduction to petitioners' income-producing activities to permit their deductibility. Petitioners contend that $300 of the amount claimed as an entertainment expense deduction was in connection with a party

given for petitioners' English Ceramics Study Group. As heretofore stated, petitioners have failed to show either a business connection with ceramics or that their activities with respect to ceramics were activities with respect to property held for the production of income. Other items claimed dealt with meetings petitioners hosted for dissatisfied shareholders for the Provident Fund for Income and partners of Imperial Jade. Petitioners have failed to show by sufficient evidence that these items were connected with the production of income. We therefore hold that petitioners have failed to carry their burden of proof with respect to the deductibility of these items. Also, petitioners have not shown in sufficient detail the amount of these expenditures or who was present and what was discussed at the meetings. The items consisting of gifts and flowers included in the claimed entertainment expenses have not been shown to have been given to persons with whom petitioners had any business connection or to be sufficiently related to petitioners' production of income activities to be deductible. The Easter baskets and gifts given to employees and the theater tickets given to Naomi Dept would only be deductible to the extent that the employees, including Naomi Dept, were shown to be business as distinguished from personal employees. This issue is discussed hereinafter.

Petitioners claimed a deduction for organization expenditures in the total amount of $665. They have substantiated expenditures of $662. Of this amount, respondent allowed only $26. Included in the items not allowed by respondent which were substantiated were $5 paid to the New Jersey Professional Engineers and $4 paid to the Retired Officers' Association. Col. Imhoff testified that as a retired officer he would be subject to recall in case of emergency. He received substantial

retired military pay income. Though not completely clear in the record, Col. Imhoff is also apparently a professional engineer, which activity is connected with his military career. Although Col. Imhoff is not now on active duty in the military, he is engaged in the business of being a military officer since he is subject to recall to active duty. Under the facts here shown, these two items are sufficiently related to Col. Imhoff's professional military career to be proper business expense deductions. Two other items which petitioners claimed as organization deductions were $5 paid to the Volunteer Medical Service Corporation and $10 paid to the Union Fire Association. Respondent does not deny that these amounts would be proper charitable deductions, but points out that petitioners did claim on their tax return substantial amounts as charitable deductions and that no portion of this claimed deduction was disallowed in the notice of deficiency. Col. Imhoff in effect testified that these amounts were not included in the claimed charitable deductions. The evidence is sketchy. However, considering the record as a whole, we hold that these two items are properly deductible as miscellaneous deductions. One other item that would appear to be deductible is the $16 payment to the Women's Board of Lankenau Hospital. However, there is no evidence in the record with respect to this item. Because of this failure of proof, this item and all other items claimed by petitioners as organization expense deductions, which respondent has not conceded or we have not held to be deductible, we hold not to be deductible.

The major argument in this case deals with petitioners' claim for a deduction of $12,500 as production and conservation of income expenses. Col. Imhoff's explanation of how he arrived at this deduction was that he

took 47.06 percent of the items listed as provisions, household items, utilities, candy and nuts, department store expenses, house and grounds expenses and miscellaneous unclassified expenses, plus the salaries of Mrs. Dept, Mrs. Whiting and Mr. Whiting, and depreciation and arrived at approximately the $12,500, which was rounded off. The total of the expenses to which petitioners applied the 47.06 percent, other than the salary and depreciation expenses, is $19,348.12. When the depreciation and salaries are added to that figure, the total is $26,485.12, and 47.06 percent of $26,485.12 is approximately $12,500. The difficulty with petitioners' position is that they have not shown that they are entitled to deduct as expenses for production of income or conservation of income-producing property any portion of most of the various items to which they applied the 47.06 percent or that 47.06 percent is a proper percentage to apply to the few items that are partially related to their production of income activities. Col. Imhoff testified that he arrived at the 47.06 percent by considering that seven rooms in petitioners' house were used for business and eight rooms for personal reasons, and that therefore 7/15ths of all household expenditures, including provisions, garden supplies and employees' salaries, were properly deductible[9] Respondent argued that the only items which should be included in any allocation of expenses to office space used by petitioners for the production of income are the $3,275.09 of utility bills and the $2,552 of depreciation.[10]

9. Obviously, 7/15ths is 46.67 percent rather than 47.06 percent, but this difference was not explained by Col. Imhoff.

10. Respondent recognizes that an allocable part of postage is also deductible. However, in our view this item and other items we will discuss hereinafter should be allocated between amounts for the production of income and personal amounts on the basis of the amount used for each purpose and not on the basis of the portion of petitioners' home used as office space.

Respondent particularly points to such items as drycleaning, flowers and dog licenses which petitioners included in the expenses they allocated partly to business. Respondent argues that petitioners have totally failed to show the allocable portion of the house used for the purposes of production of income, but on brief concedes that 5.78 percent of the house was used for production of income purposes.[11]

In the recent case of *Browne v. Commissioner* [Dec. 36,733(M)], 73 T. C. No. 56 (filed January 22, 1980), we discussed the method of computing a home office expense deduction for an individual who used a portion of her apartment in her trade or business. We see no reason why any different method should be used in determining the proper deduction by an individual who uses a portion of his home in connection with activities for production of income. As was pointed out in *Bingham's Trust v. Commissioner, supra* at 373, "section 23(a)(2) [the predecessor of section 212] is comparable and in pari materia with section 23(a)(1) [the predecessor of section 162], authorizing the deduction of business or trade expenses." In the *Bingham's Trust* case the Court pointed out that, as in the case of business expenses, if the expense is ordinary and necessary it need not relate directly to the production of income if it is "directly connected with or proximately results from the conduct of the business." The Court then stated (at 374):

> The effect of section 23(a)(2) was to provide for a class of nonbusiness deductions coextensive

11. Respondent obtained this figure from two prior cases involving the same petitioners. *Imhoff v. Commissioner* [Dec. 30,269(M)], T. C. Memo. 1970-221, 29 TCM 966, 39 P-H Memo. T. C. par. 70,221, p. 1056 (1970), involving the years 1961, 1962 and 1963, and the case of *Imhoff v. Commissioner* [Dec. 35,886(M)], T. C. Memo. 1979-57, 38 TCM 230, 48 P-H Memo. T. C. par. 79,057, p. 231 (1979), involving the years 1971 and 1972.

> with the business deductions allowed by section 23(a)(1), except for the fact that, since they were not incurred in connection with a business, the section made it necessary that they be incurred for the production of income or in the management or conservation of property held for the production of income. *McDonald v. Commissioner, supra,* 61-62, 66; and see H. Rep. No. 2333, 77th Cong., 2d Sess., pp. 46, 74-76; S. Rep. No. 1631, 77th Cong., 2d Sess., pp. 87-88.

In our view the same criteria should be used for determining the amount of a deduction to which a taxpayer is entitled for a home office used by him in connection with the production of income as is used to determine the deduction where a taxpayer's house is partially used in his trade or business. In *Browne v. Commissioner, supra,* we pointed out that a taxpayer must prove not only what part of the residence was used for business purposes but also the portion of the time it was so used. We then discussed respondent's contention that the allocation should properly be made by comparing the time of business use of the premises with the total time the premises were available for both business and personal use. Under such a method, it is obvious that any allocation of part of the costs of maintaining petitioners' house to income-producing activities would be very very small. However, we rejected respondent's method of allocation even though recognizing that the Court of Appeals in *Gino v. Commissioner* [76-2 USTC ¶ 9528], 538 F. 2d 833 (9th Cir. 1976), in reversing 60 T. C. 304 (1973) in this respect had used such a system of allocation. We concluded that the appropriate method of determining the allocation between business and nonbusiness use of premises should be the allocation used by this Court in *Gino v. Commissioner, supra.* In the *Gino*

case, the allocation was made by obtaining the ratio which results from the total hours the premises are used for business divided by the time the space was actually used for all purposes.

The problem in the instant case is that we lack information in this record to make the proper determination. Col. Imhoff testified that seven rooms were used exclusively in activities related to the production of income. He testified that in the library on the first floor he did reading and he and Mrs. Imhoff watched television. It was his view that any information he obtained helped him in his production of income activity and therefore almost everything he did was a production of income activity. It was also his view that because papers were stacked on the table in the room that had previously been used as a dining room, this room was used exclusively for production of income purposes. Also, Col. Imhoff refused to determine on a square footage basis the space in the house which he considered to be used for the production of income as compared to the total space in the house. He stated that he made his determination on a different basis. It is obvious from the facts we had found that even the seven rooms which Col. Imhoff testified were used exclusively for production of income purposes did not constitute a percentage approaching 47 percent of the total square footage of the house. However, there is nothing in this record to assist us in determining what percentage of the floor space they did constitute. It was Col. Imhoff's view that a room is a room regardless of its size and that hallways, utility rooms and closets and comparable spaces should not count as space. Therefore, petitioners have totally failed to prove even the percentage of the square footage in their home which they contend was used for the purpose of production of income.

It is also clear from this record that there was no "production of income" reason for using seven rooms in petitioners' home to spread out papers that occasionally were worked on. Also, it is clear that not all of Col. Imhoff's reading was proximately related to his production of income activities. Insofar as this record shows, none of his watching of television was proximately related to his production of income activities. The house was large and obviously two people with one housekeeper and a little extra part-time help not only did not need all that space but could not conveniently even use it for personal living space. The fact that a taxpayer who has extra space chooses to stack some income tax papers or investment-related papers in extra space in his home because it is convenient for him to do so does not cause that space to be directly or proximately connected with his production of income or to be an ordinary and necessary expense. See *Sharon v. Commissioner* [Dec. 33,890], 66 T. C. 515, 522-525 (1976). On the basis of this record, we are totally unable to determine either the percentage of the total square footage of petitioners' residence which petitioners contend was used for income-producing purposes or the part it would be "necessary" in the statutory sense of ordinary and necessary expenses for petitioners to use for office space. There is no evidence giving a reasonable indication of the times such space was used for purposes of the production of income as compared to the time it was actually used for all purposes. Because of this total failure of proof on the part of petitioners, we accept respondent's concession and use the 5.78 percent as the appropriate percentage of the premises used for production of income purposes. As respondent points out, this percentage should be applied to the utility costs and depreciation. However, in our view this percentage should also be applied to homeowners insurance as distinguished from the various

liability insurances carried by petitioners, since this space was protected by the homeowners insurance just as was the balance of the house. Also, in our view, this percentage should be applied to the wages paid to Mr. Whiting since the record is reasonably clear that he did the heavy cleaning of the space used for production of income as well as the other parts of the house.

However, we do not agree with petitioners that the salary and other payments made to Mrs. Dept should be allocated on any space percentage basis. Mrs. Dept not only did cleaning, she did cooking and ran errands and performed the other functions generally done by a housekeeper. The record does show that she did some business driving for Mrs. Imhoff. While petitioners are technically correct that the cost of Mrs. Dept's food should be added to her wages to determine her total compensation before allocation of some portion thereof to petitioners' production of income activities, this record is totally inadequate to show the amount of that cost. The social security taxes paid for Mrs. Dept are shown in the record and, in considering what portion of Mrs. Dept's wages might be properly considered to be an expense of petitioners' production of income, these amounts should be taken into consideration. In spite of the record, we have considered the time that Mrs. Dept might have spent in cleaning the spaces in the home used for the production of income, the time she might have spent as a business chauffeur for Mrs. Imhoff in connection with Mrs. Imhoff's production of income activities, and any other functions she may have served related to petitioners' production of income. We have considered not only her salary but also that some amount should be allowed for the cost of her food and that social security taxes paid on her behalf should be added to her salary. Using our best judgment

in this respect, under the principles of *Cohan v. Commissioner* [2 USTC ¶ 489], 39 F. 2d 540 (2d Cir. 1930), we determine that the amount of $700 of Mrs. Dept's wages, including food costs and other items paid by petitioners on her behalf and social security taxes paid on her wages, is properly deductible by petitioners.

The only activity which Mrs. Whiting performed in connection with the space used by petitioners for production of income shown by this record is the washing of curtains and slip covers. Again, on the basis of *Cohan v. Commissioner, supra,* we have estimated this amount at $40 for the year 1973.

Petitioners have totally failed to show why any portion of the ground upkeep should be allocated to their production of income activities. Insofar as this record shows, the only persons who came to the house in connection with such activities were some account executives. The record fails to show how often anyone came to petitioners' home in connection with income-producing activities. In our view, the upkeep of the 3½ acres of ground was not proximately related to petitioners' production of income activities and no part of this expense is deductible.

Col. Imhoff testified that all of the certified and registered letters he sent were in connection with the petitioners' property rental or stock or bond transactions. The other facts in this record indicate that this is in fact the situation. We hold that petitioners are entitled to deduct all costs of registered and certified mail paid in 1973. The record does not show an adequate basis for allocation of the other postage costs between personal and production of income activities. However, considering the testimony of the investment activities of petitioners we conclude that one-half of this amount is also properly deductible.

The cost of stationery used for production of income activities has no relationship to the space in the home used for production of income purposes. The record shows purchases of stationery but does not show the amounts of this stationery used for personal as compared to production of income purposes. Considering the testimony as to the amount of writing in connection with production of income activities which petitioners did, we have concluded that 50 percent of the stationery costs paid by petitioners in 1973 is properly deductible.

We have considered the nature of all the other expenses claimed by petitioners to be partially deductible as amounts paid for the production of income and have concluded that this record is insufficient to show that any portion of these amounts is properly deductible.[12]

Decision will be entered under Rule 155.

/s/ IRENE F. SCOTT, *J.*

12. Petitioners in their brief primarily argue that we should hold that there is no deficiency in their tax for 1973 since respondent did not properly comply with an order entered by this Court on February 1, 1978, directing the parties to stipulate facts in accordance with Rule 91(f) of the Rules of Practice and Procedure of this Court. A motion to this effect was made by Col. Imhoff at the trial and denied. However, since petitioners' brief is devoted primarily to this argument, it is of little help to the Court in understanding the basis of petitioners' position with respect to the various items claimed by them to be deductible. Col. Imhoff was informed by the Court on several occasions during the course of the trial that it was incumbent upon petitioners to prove that they were entitled to the deductions claimed. Apparently this fact had been also brought to his attention at the trial of the case involving the years 1971 and 1972. See *Imhoff v. Commissioner* [Dec. 35,886(M)], TC Memo. 1979-57 (filed February 15, 1979).

IN THE
UNITED STATES TAX COURT
WASHINGTON, D. C.

Docket No. 441-77

JOSEPH J. IMHOFF and Estate of EDITH M. IMHOFF, Deceased, JOSEPH J. IMHOFF and AMERICAN SECURITY BANK N.A., Co-Executors

v.

COMMISSIONER OF INTERNAL REVENUE

DECISION

IRENE F. SCOTT, *J.* September 9, 1981

Pursuant to the opinion of the Court filed January 31, 1980, and incorporating herein the facts recited in the respondent's computation as the findings of the Court it is

ORDERED and DECIDED: That there is a deficiency in income tax due from the petitioners for the taxable year 1973 in the amount of $6,675.00.

/s/ IRENE F. SCOTT, *J.*

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3004

JOSEPH J. IMHOFF and ESTATE OF EDITH M. IMHOFF, DECEASED, JOSEPH J. IMHOFF and AMERICAN SECURITY BANK N.A. CO-EXECUTORS,

Appellants

v.

COMMISSIONER OF INTERNAL REVENUE
(T.C. No. 441-77)

ON APPEAL FROM A DECISION OF THE UNITED STATES TAX COURT

Submitted Under Third Circuit Rule 12(6)
July 29, 1982

Before: GIBBONS and HUNTER, *Circuit Judges*
and POLLAK, *District Judge* *

JUDGMENT ORDER

Joseph J. Imhoff and the Estate of Edith M. Imhoff, deceased, appeal from a decision of the Tax Court deter-

* Hon. Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

mining a deficiency in their 1973 federal income tax in the amount of $6,675. They contend that the deficiency should be dismissed because the attorney for the Internal Revenue Service obtained a continuance by a misrepresentation to the court. The Tax Court did not abuse its discretion in denying taxpayers' motion.

It is ORDERED and ADJUDGED that the decision of the Tax Court be and is hereby affirmed. Costs are taxed in favor of appellee.

By THE COURT,

JOHN J. GIBBONS
Circuit Judge

Attest:

SALLY MRVOS, Clerk
DATED: JUL 30 1982
Certified as a true copy and issued in leiu of a formal mandate on September 1, 1982.

Test:

M. ELIZABETH FERGUSON
Chief Deputy Clerk, United States Court of Appeals for the Third Circuit

Costs taxed in favor of appellee as follows:
Brief $32.34

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-3004

JOSEPH J. IMHOFF and ESTATE OF EDITH M. IMHOFF, DECEASED, JOSEPH J. IMHOFF and AMERICAN SECURITY BANK N.A. CO-EXECUTORS,

Appellants

v.

COMMISSIONER OF INTERNAL REVENUE
(T.C. No. 441-77)

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and POLLAK,* *District Judge*

The petition for rehearing filed by appellants in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit

* Hon. Louis H. Pollak, United States District Judge for the Eastern District of Pennsylvania, as to panel rehearing only.

judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,
JOHN J. GIBBONS, *Judge*

Dated: AUG 24 1982

IN THE
UNITED STATES TAX COURT
WASHINGTON, D. C.

Docket No. 441-77

JOSEPH J. IMHOFF and Estate of EDITH M. IMHOFF, Deceased, JOSEPH J. IMHOFF and AMERICAN SECURITY BANK N.A., Co-Executors

v.

COMMISSIONER OF INTERNAL REVENUE

PETITION FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION OUT OF TIME OR, IN THE ALTERNATIVE, MOTION TO DISMISS

Petitioners respectfully petition the Court to accept this Petition for leave to file a Motion for Reconsideration or, in the alternative, Motion to Dismiss (the "Motion") as if it were timely filed by Petitioners. As reasons for the Motion, Petitioners state:

1. At the time this case was tried, the Petitioners represented themselves.

2. On April 2, 1981, counsel entered their appearance on behalf of the Petitioners in this case.

3. Counsel believe that unless Respondent will admit the facts alleged in Petitioner Joseph J. Imhoff's affidavit attached to the Motion and incorporated therein by reference, an evidentiary hearing on the averments in such affidavit as presented in the Motion will be necessary

for the adequate presentation of Petitioners' case before this Court.

WHEREFORE in the interest of justice, the integrity of the process of this Court and the appearance of such integrity, the undersigned counsel request the Court to grant this Petition and to accept, and direct the filing of, the attached Motion and affidavit thereto.

Dated: August 31, 1981

/s/ SAMUEL T. SWANSEN
Samuel T. Swansen
Counsel for Petitioners

Of Counsel:

Dechert Price & Rhoads
3400 Centre Square West
1500 Market Street
Philadelphia, PA 19102

U. S. TAX COURT
D E N I E D
SEP 3 1981

(Signed) Irene F. Scott
Judge

Docket No. 441-77

JOSEPH J. IMHOFF and ESTATE OF EDITH M. IMHOFF, DECEASED, JOSEPH J. IMHOFF and AMERICAN SECURITY BANK, Executors,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

AFFIDAVIT OF COLONEL JOSEPH J. IMHOFF IN SUPPORT OF MOTION FOR RECONSIDERATION OUT OF TIME OR, IN THE ALTERNATIVE, MOTION TO DISMISS

STATE OF PENNSYLVANIA }
COUNTY OF MONTGOMERY } SS.

Colonel Joseph J. Imhoff, one of the petitioners in the above-captioned matter, in support of petitioners' motion for leave to file Motion for Reconsideration Out of Time or Motion to Dismiss respectfully avers as follows:

1. On Wednesday, February 1, 1978, at trial of the above-captioned matter before The Honorable William H. Quealy of this Court, affiant and Russell K. Stewart, Esquire, Assistant District Counsel for the Internal Revenue Service (IRS) appeared before Judge Quealy. After discussions as to the readiness of the case for trial, the Court directed the parties to arrive at a stipulation of facts by Wednesday, February 15, 1978, and indicated that the party who failed to cooperate would have the

case dismissed adversely to him. See Notes of Testimony (N.T.) 7-8, 14-17—2/1/78 (copy attached).

2. As a means of achieving the stipulation, Judge Quealy directed Col. Imhoff to deliver to the district counsel's office by Friday, February 10, 1978, "whatever evidence you have and propose to offer at the trial of this case to substantiate and identify the amounts claimed in your return as deductions. . . ." (N.T. 7—2/1/78).

3. Judge Quealy then directed Mr. Stewart to prepare the stipulation, working over the weekend if necessary, to have it ready to hand up to the Court on Tuesday, February 21, 1978, the day that the case was scheduled for trial (N.T. 19—2/1/78).

4. At the conclusion of the pretrial conference on February 1, 1978, during a portion thereof which was conducted in the Court's chambers without a stenographic record being made, your affiant inquired whether he should appear on February 15, and Judge Quealy indicated that that would not be necessary. Your affiant, nevertheless, indicated that he would prefer to be present, but Judge Quealy directed him not to appear.

5. Your affiant appeared at the offices of the district counsel one day early on Thursday, February 9, 1978, with checks and receipts for items paid looking toward preparation of the stipulation with Mr. Stewart. They worked on preparing the stipulation until late in the afternoon. Your affiant offered to stay late that evening and to return the next day and agreed to work through the weekend with Mr. Stewart to enable him to complete the stipulation as Judge Quealy had directed. Mr. Stewart, however, stated that he would contact your affiant when Mr. Stewart would again be able to work on the stipulation. Your affiant reminded Mr. Stewart that they were expected to

complete the stipulation by February 21, 1978. Mr. Stewart replied that it would be his responsibility and that he would take care of it.

6. On Monday, February 13, 1978, Mr. Stewart appeared for a scheduled routine calendar call before Judge Quealy without your affiant being present and indicated that the stipulation was being worked on.

7. On Wednesday, February 15, 1978, Mr. Stewart again appeared before Judge Quealy without your affiant (per Judge Quealy's earlier direction) and misrepresented the following circumstance: That the petitioners, Col. and Mrs. Imhoff, had requested a continuance of the case given Mrs. Imhoff's illness. See N.T. 2—2/15/78 (copy attached).

8. Prior to the misrepresentation referred to in the preceding paragraph, Mr. Stewart had neither contacted the petitioners about continuing the stipulation preparation nor completed a draft that he had submitted to petitioners.

9. Upon receiving the misrepresentation by Mr. Stewart, which the petitioners in no way authorized and despite Judge Quealy's earlier admonition that the Court would accept no oral stipulations in this case (N.T. 14—2/1/78), Judge Quealy continued the case generally which caused it to eventually be assigned to the Honorable Irene F. Scott.

10. Affiant did not receive further contact from Mr. Stewart about working on the stipulation until October 1978 despite a few intervening calls in which Mr. Stewart assured your affiant that the matter was under control and that he would be back in contact with your affiant.

11. The above captioned matter was eventually scheduled for trial on Monday, January 31, 1979, before

Judge Scott, and it was tried on that day and the following day.

12. On February 22, 1979, more than one year after the event and only after your affiant had conducted an extensive search to learn what had gone on on February 15, 1978, and despite the National Reporting Company's assurance that no such proceeding had ever occurred (N.T. 5—4/18/79), your affiant received a copy of the notes of testimony of the proceedings on that date which are set forth as an exhibit to paragraph 7 above.

13. At the start of the trial on January 31, 1979, your affiant moved the Court to dismiss the case for failure of Mr. Stewart to comply with Judge Quealy's order that the written stipulation be handed up by February 21, 1978 (N.T. 26-27—1/31/79). The motion was denied (N.T. 27—1/31/79).

14. After your affiant received the notes of testimony of the proceedings of February 15, 1978, he again moved the Court to dismiss the case against the IRS, after making an opening statement pointing to Mr. Stewart's "false and misleading" and unauthorized statement (N.T. 8—4/18/79). That motion was denied (N.T. 9—4/18/79).

15. Your affiant believes and therefore alleges that had the true state of affairs been revealed to Judge Quealy on February 15, 1978, he would have found the IRS in violation of his earlier order as to the completion of the stipulation and, therefore, would have routinely dismissed the case adversely to the IRS.

16. Your affiant believes and therefore alleges that Mr. Stewart has misled the Court so as to impugn the integrity of the Court's process in this matter in fact as well as to create the appearance of impropriety given the foregoing allegations.

17. Your affiant submits this affidavit in connection with his motion for leave to file a Motion for Reconsideration Out of Time or, in the alternative, a Motion to Dismiss believing that following the grant of a limited evidentiary hearing confined to the matters raised in this affidavit, the Court will conclude that a dismissal of the above-captioned matter adversely to the IRS is proper and in the interest of justice.

Respectfully submitted,

/s/ JOSEPH J. IMHOFF
Joseph J. Imhoff

Sworn to or affirmed
and subscribed before me
this 31 day of Aug. 1981.
/s/ ELEANOR H. RUTAN
Notary Public

Eleanor H. Rutan, Notary Public
Lower Merion Twp., Montgomery Co.
My Commission Expires June 20, 1983

TRANSCRIPT OF PROCEEDINGS BEFORE THE TAX COURT, FEBRUARY 1, 1978

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part"—and then I go on and quote it.

THE COURT: Well, Mr. Imhoff, we'll avoid any problem in that area, as the Court proposes to enter an order before this coming Monday, which is the 7th of February, that you deliver to the Respondent for purposes of stipulation——

MR. IMHOFF: Will you speak up a little bit please?

THE COURT: I say the Court proposes to enter an order that you deliver to the Respondent for purposes of stipulation, whatever evidence you have and propose to offer at the trial of this case to substantiate and identify the amounts claimed in your return as deductions totaling $18,240—$18,214, segregated as to the categories therein, and by that I mean $12,500, if that's the amount, as expenses incurred in production and conservation of income. What was the character of that expenditure? We're looking for two things, one, the amount, and what the amount was paid for. Neither you nor the Respondent will be required to stipulate as to what the purpose was. That will be the question that we will have to decide. But as to whether or not a specific amount was paid to a specific payee, and who that payee was, will be required as a basis for stipulation, and in order to accomplish that purpose and avoid having to go through item by item and identifying and presenting them in evidence, the Court expects that material to be stipulated.

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And pursuant to the order that will be issued by this Court, if you deliver that material to Mr. Stewart by Monday, you will have discharged your responsibility.

If he receives that material and is unwilling to stipulate it, then he will be the party that will have to account for the failure to stipulate, because the Court wants to tell both parties right now that without a stipulation of fact, and without the parties working toward accomplishing that, the Court intends to dismiss this proceeding either one way or the other, either in favor of party A or party B, whichever the party is at fault. The Court has no intentions of going up to Philadelphia again and sitting in and taking in item by item and check by check. That's not the way we try cases, and if we had to try them all that way we'd never get our job done. The rules provide differently and I intend to hold both parties to those rules.

MR. IMHOFF: Could you tell me when I could expect to have a copy of this order so that I may read it?

THE COURT: Well, if you stick around, we might get it to you before the day is out. If not, we'll have it in the mail today.

MR. IMHOFF: And your——

THE COURT: And that also applies to the $400 legal expenses, and if you have a check that you paid $400 to an attorney for a legal fee that had to do with the

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MR. IMHOFF: Well——

THE COURT: Let's get that understood right from the start and the——

MR. IMHOFF: Can I make a comment?

THE COURT: You can make any comment you want.

MR. IMHOFF: May I comment now?

THE COURT: You certainly may.

MR. IMHOFF: Well, I think that you are misinterpreting our position. Our fundamental position is to be required to proceed with Messrs. Stewart and Pitetti in regard to stipulations in relation to the docket 441-77, and the refusal relates to them, because I think it is improper in view of the pending complaint against these two people in the two cited dockets.

THE COURT: Well, Mr. Imhoff, we can't wait until someone undertakes to decide your complaint. It isn't going to be decided before this Court in any event. These gentlemen, both of whom are presently authorized to act on behalf of the Government of the United States, and as such they're entitled to represent the Government in this case. The Court intends to keep strict control over both sides, and to try this case in the proper manner, just as any other case. That requires entering into a stipulation process, and if Mr. Stewart is dilatory I'll default him just as quickly as I'll default you.

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THE COURT: All right. We'll enter an order requiring you to produce these records by February the 11th.

THE CLERK: That would be a Saturday, Your Honor.

THE COURT: February 11th is Friday according to my—here we are. Produce it by—the calendar starts the 13th or 14th?

THE CLERK: 13th.

THE COURT: 13th. Produce it by February the 10th. If you produce it by February the 10th we'll set your case for trial during the second week of the calendar which will be beginning February the 20th. That will give the parties one week within which Mr. Stewart can look over these checks, you can put them in such form as may be stipulated, make copies if he wishes, so that

before I conclude the trials during the week of February the 13th, we should have a stipulation ready for Monday morning, February the 20th. Now, what do you say about that, Mr. Stewart?

MR. STEWART: First of all, Your Honor, I appreciate the Court's concern. However, on this calendar I have five other matters which are occurring——

THE COURT: I don't care whether you have 50 other matters. If you can't try the case we'll continue the case.

MR. STEWART: Let me——

THE COURT: I'm not going to sit down there and work out of a shoebox. Now, if you can't do this, just tell

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me.

MR. STEWART: I understand, Your Honor. I just want to explain.

THE COURT: All right, don't explain it then. Just say, "I can't do it".

MR. STEWART: Would the Court accept an oral stipulation if it's——

THE COURT: No. I would not accept an oral stipulation. If the case isn't ready for trial by the 20th it won't be tried. Now I'm ordering Mr. Imhoff to produce his records by the 10th.

MR. STEWART: Could you make that the 9th, Your Honor, and at least give me the weekend before the calendar call?

THE COURT: No, let's have it the 10th. As he says he's a little tight on time here, too. He's going to produce it by the 10th and you should have all the evidence you

need. All you've got to do is have somebody run off copies and slap them into a stipulation.

MR. STEWART: Your Honor, last time there were almost 435 exhibits,

THE COURT: Well, if there are 435 they've got a week to do it in. If he produces it on the 10th you have until the 17th. Now if we can't do it that way we can't try the case because I can assure both sides of one thing.

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I have no intentions of sitting up there seeing you pull checks out of a shoebox. Now, that's that.

MR. STEWART: Could you make the requirement that the materials be delivered to me no later than 10:00 o'clock on the 10th? At least to give me time——

THE COURT: No, no, I'm just going to leave the working day. You can take it home, it will give you a nice something to do over the weekend, in case it snows and you get snowed in. So the order will be that Mr. Imhoff is to produce his substantiation for purposes of stipulation during the working day of February the 10th, say, before 3:00 o'clock p.m. on February the 10th, and the Respondent will report to the Court before noon on February the 17th as to whether or not the Respondent is prepared to and will have ready a stipulation that will provide for the introduction of this evidence into the case.

MR. STEWART: One further thing——

THE COURT: And if that schedule goes as I hope it will, then we'll try the case on February the 20th. If it doesn't, we'll just put it on the back burner.

MR. STEWART: One further thing, Your Honor. In the past, with a stipulation between the Petitioner and the Respondent in this case the language has been extremely difficult.

THE COURT: I'm not talking about language. I'm
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just talking about identifying. I'm beginning to wonder, Mr. Stewart, whether Mr. Imhoff doesn't have some reason for his complaints here. I don't know. I'm not talking about language. You don't—there's no basis for objecting to any language when you're just stipulating documents, and——

MR. STEWART: Well, I know that, Your Honor, but does the Petitioner——

THE COURT: —that's all I'm talking about. I just want them identified—payor, payee, and so forth, and if the parties can agree who the payee was. I don't care about the nature of the services or if you can agree that it's allowable, fine. If out of this $18,000 you can't find anything to allow I'd be very much surprised, so I——

MR. STEWART: I would be too, Your Honor. In fact in the previous case I have had no difficulty stipulating to the expenditures of the amounts for the purposes—of stating the question of whether they're deductible or not has been Respondent's primary and for the most part sole objection.

THE COURT: That's right, that's correct. So the order will be that Mr. Imhoff will give you all this information by the 10th and that will give you a week to have your people put it together and before the end of the following week you can report to the Court as to whether or not we're going to be ready for trial. And in light of that
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order there's no need to act upon the Respondent's rule to show cause, and that will be held in abeyance pending the disposition of the Court's order that the parties proceed to stipulate. And in the event of their failure to do so I'll take what action may be necessary.

MR. STEWART: Your Honor, do I take that to mean that the Court is not passing upon the present proposed stipulation of fact?

THE COURT: The present proposed stipulation is inadequate. I'd have to rule that you weren't prepared for trial if that's the only stipulation you can offer up.

MR. STEWART: At the moment that's all the Respondent has, Your Honor.

THE COURT: I know, but you're going to get more, so you can have that plus the rest of it. We don't care—Respondent received a reply from Petitioner declining to appear at the conference. Is that part of your stipulation?

MR. STEWART: No, the stipulation, Your Honor, for taxes and exhibits.

The Court: The stipulation is the only thing about—that he filed a return, isn't it?

MR. STEWART: Filed a return? We——

THE COURT: And that he claimed some—Your stipulation would be covered by just presenting the return

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in evidence, right? There's nothing in your stipulation that wouldn't appear on the face of the return.

MR. STEWART: Or on the statutory notice.

THE COURT: So anyhow, that appropriate order will be entered, and if everything goes as I hope that it will, and both sides are reasonable, why, I'll see you gentlemen on February 20th and we'll decide on any—how much of these deductions or more or less or whatever may be justified.

MR. STEWART: One further question, Your Honor. Just to clarify—February 20th is a legal holiday. Is the Court intending to sit on that day?

THE COURT: Well, are we going to be able to sit on the 20th up there?

MR. STEWART: If you want to. I have no objection.

THE COURT: Well, we'll make it the 21st then.

MR. STEWART: But it is a legal holiday. I just wanted you to know.

THE COURT: It is? Well, I was wondering whether that was going to cause us a problem up there, just because—I knew it was a holiday but I didn't know whether it was just a Washington holiday or——

MR. STEWART: No, it's a Federal.

THE COURT: —or a Philadelphia holiday. Well,

TRANSCRIPT OF PROCEEDINGS BEFORE THE TAX COURT, FEBRUARY 15, 1978

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THE CLERK: Docket No. 441-77, Joseph J. Imhoff and Edith M. Imhoff. Would you state your appearances for the record please?

MR. STEWART: Russell K. Stewart for the respondent. Good morning, Your Honor. As was discussed Monday with the Court, Your Honor, Colonel Imhoff has requested a continuance because of the illness of his wife. We have made some substantial progress since our appearing in Washington on February 1st and that we can hope expect that progress to continue next week and the following weeks to come. Respondent has no objection to the petitioner's request for a continuance, but would request that the Court consider putting the matter on the next available calendar.

THE COURT: The Court will make that recommendation and I think the Court would couple it but we've put on a calendar for report, which need not be—it can be made in writing sometime prior to the calendar that it's on for trial so that we can be sure that we—when it does go on the calendar for trial, he has brought in his information in advance and you've had a chance to look at it.

MR. STEWART: That would be fine, Your Honor. In fact, I appreciate it.

THE COURT: I mean, that's the only thing—I don't want to unload it on some—the next Judge and have him—

TRANSCRIPT OF PROCEEDINGS BEFORE THE TAX COURT, JANUARY 31, 1979

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there are some things—

THE COURT: If it's for—if any item you claim to be deductible, other than in connection with these two operations, note it, so I will understand it. All right, now let's start, and you start where you want to, on the expenses.

THE WITNESS: Well, as I have indicated, both yesterday and today, I think the proper place to make this proposed oral motion, is at the beginning, rather than get it all mixed up.

THE COURT: Oh certainly. Why don't you make it. You can be excused as a witness, until you make it, because I told you what I'm going to do, or you can make it—

THE WITNESS: Okay.

THE COURT: You're excused as a witness, and you can just sit there and make it.

(witness excused)

MR. IMHOFF: Pursuant to the pre-trial conference of yesterday afternoon, when I stated it was the petitioner's intention to make a motion for dismissal of this case, I request an opportunity make such an oral motion at this time.

THE COURT: You certainly may. Go right ahead.

MR. IMHOFF: Petitioners move, herewith, to dismiss this case, for the reasons set forth in hearing, before Judge Quealy in Washington, D.C., on 1, February, 1978, and

his order of same date. Specifically, the basis for the dismissal, is

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the purported fact that respondent counsel, Russell K. Stewart, S-t-e-w-a-r-t, either did do, or did not do, the very things that the Court clearly stated—and with added emphasis—would result in the dismissal of this case, in favor of the opposing party. The subject reasons are set forth in the transcript of the case, Joseph J. and Edith M. Imhoff, Petitioners, versus Commissioner of Internal Revenue, Respondent. Particular reference is made in the February 1978 hearing transcript to the following: Page 7, line 15—page 8, line 16. Next, page 10, line 21—line 25. Page 13, line 15—page 17, line 5. And final reference, is page 18, line 4—line 9.

THE COURT: Now, does that conclude your motion?

MR. IMHOFF: That concludes my motion.

THE COURT: And, as I told you, and gave you much more detailed reasons in chambers yesterday, I will deny the motion, because in my judgment, to summarize it briefly, when Judge Quealy, on respondent's motion continued the case generally, it ended that portion of what he had been doing. It would have been up to him then, to have dismissed it, had he not determined otherwise, and when it was continued generally, it came into the jurisdiction of the next Judge, that got it, that happened to be me, and I do not think that there's any ground here, for a dismissal, and therefore, I will not dismiss it, even though I wish you all had gotten this done [at page 28] much earlier.

TRANSCRIPT OF PROCEEDINGS BEFORE THE TAX COURT, APRIL 18, 1979

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or any explanation. Subsequently, when I was billed for the 1979 court transcripts, I again requested the National Reporting Company, via letter dated 17 February 1979, to send me a photocopy of the subject document, or to confirm that no such document existed. And I'll read the pertinent—or, a pertinent paragraph of the 15 February 1978 transcript. "Mr. Stewart:"——

THE COURT: Well you did finally get it then, I take it?

MR. IMHOFF: Yes.

THE COURT: From the reporter?

MR. IMHOFF: Yes.

THE COURT: That's right. I remember now, I gave you copies of the other things, but I thought the reporting company was entitled to be paid for the transcript, so I didn't give you that. Go ahead.

MR. IMHOFF: Yes. Yes, and as I say—that gets explained in the—further on in my opening statement. So getting back to the 15 February 1978 transcript, I quote the pertinent paragraph—opening paragraph, incidentally.

"Mr. Stewart: Russell K. Stewart for the Respondent. Good morning, Your Honor. As was discussed Monday with the Court, Your Honor, Colonel Imhoff has requested a continuance because of the illness of his wife. We have made some substantial progress since our appearing in Washington on

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February 1st. And that we can hope, expect, that progress to continue next week and the following weeks

to come. Respondent has no objection to the Petitioner's request for a continuance, but would request that the Court consider putting the matter on the next available calendar." The foregoing statement is false and misleading, I never authorized Respondent counsel to represent Mrs. Imhoff and me. Further, the thought of our requesting, or agreeing "that the Court consider putting the matter on the next available calendar"—is incredible. For reasons just stated, in addition to those cited in Petitioner's previous motion to dismiss the case, I again move the Court give consideration to dismissing this case—as was threatened by Judge Quealy at the 1 February 1978 hearing—as the next order of business. That concludes my opening statement. Thank you, Your Honor.

THE COURT: Well you knew it was continued though, I assume?

MR. IMHOFF: I did know that it was continued. And I was prepared to go right ahead with the stipulation procedure which Judge Quealy had ordered and which I understood.

THE COURT: Well——

MR. IMHOFF: So this came as a complete surprise and not only a surprise, but I might say, a shock to me.

THE COURT: Well now I've heard your statement. [9]

I've said before, "off the record" and "on the record", I am not going to dismiss this case with the determination there are no deficiencies. I am going to determine the case on the basis of the record after giving you every reasonable opportunity to establish what you can establish in the record. And I'm not going into—again, to the reasons. But—so that takes care of that. Now let's proceed and see where we are on this stipulation.

Office-Supreme Court, U.S.
FILED
JAN 26 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-864

In the Supreme Court of the United States

OCTOBER TERM, 1982

JOSEPH J. IMHOFF, ET AL., PETITIONERS

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

REX E. LEE
Solicitor General
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Washington, D.C. 20530
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v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

Petitioners[1] seek review of the decision below determining a deficiency in their federal income taxes for 1973, on the ground that the Commissioner's attorney obtained a continuance through a factual misrepresentation.

The pertinent facts may be summarized as follows: On audit of petitioners' federal income taxes for 1973, the Commissioner determined a deficiency of $8,978 based on the disallowance of approximately $18,000 in miscellaneous deductions claimed, inter alia, for depreciation on

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[1]Joseph J. Imhoff and Edith M. Imhoff were married in 1973 and filed a joint federal income tax return for that year. They jointly petitioned the Tax Court for a redetermination of the deficiency asserted against them for that year, and they are referred to as "petitioners". In April 1980, Edith Imhoff died, and the co-executors of her estate were substituted as a party.

their large home, for utility expenditures, and for salaries paid persons employed in maintaining their residence. Petitioners sought redetermination of the deficiency in the Tax Court, appearing pro se. Following petitioners' refusal to participate with the Commissioner's attorney in preparing a stipulation of facts required by Rule 91(a) of the Tax Court Rules, and in response to the Commissioner's motion for an order to show cause why certain facts should not be admitted, Judge Quealy, at a motions session in Washington, D.C. on February 1, 1978, directed petitioners to present to the Commissioner's attorney by February 10, 1978, evidence showing they had in fact incurred the expenses for which they claimed the disputed deductions. Judge Quealy further directed the Commissioner's attorney to prepare a stipulation listing amounts paid, to whom paid, and for what purpose payments were made, and to report to the court by February 17, 1978. The court advised the parties that if they complied with its direction, the case would be tried on February 21, 1978, in Philadelphia. However, the court orally warned the parties that if either side failed to comply with his direction, he would dismiss the case in favor of the other side (A. 1-10, 44; Doc. A at 2).[2] On February 9, 1978, petitioners presented their evidence to the Commissioner's attorney. On February 15, 1978, at a trial calendar in Philadelphia, the Commissioner's attorney reported to Judge Quealy, in petitioners' absence, that petitioners had presented their evidence but had requested a continuance of trial because of Mrs. Imhoff's illness. Judge Quealy thereupon continued the proceedings (Pet. 3-4; Pet. App. A3-A5, A44-A45, A51). Petitioners were promptly notified of the order granting a continuance of trial and raised no objection (A. 11-12; Doc. A at 2).

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[2] "A." references are to the separately bound record appendix filed by petitioners with the court of appeals. "Doc." references are to the document numbers assigned by the Clerk of the Tax Court to the documents not included in petitioners' appendix.

The case was reassigned for trial before Judge Scott at a subsequent trial calendar in Philadelphia. Petitioners sought to have the case dismissed in their favor on the alleged grounds that the Commissioner's attorney had not prepared the stipulation by the date set by Judge Quealy, and that the attorney's representation to the Court that petitioners had requested a continuance was false. Judge Scott denied petitioners' motions to that effect, explaining that she now had jurisdiction over the case and that she was not going to dismiss the case with a determination of no deficiency, but would try the case on the merits. After a full trial, Judge Scott allowed some claimed deductions and disallowed others, and accordingly redetermined the deficiency to be $6,675 (Pet. App. A55; A53; A30-31).[3]

On appeal, petitioners did not challenge the correctness of the decision on the merits, but argued only that the alleged misrepresentation by the Commissioner's attorney constituted fraud on the court and, therefore, that the court should have dismissed the case in favor of petitioners. The court of appeals affirmed. It concluded that the Tax Court did not abuse its discretion in refusing to dismiss the deficiency on account of the alleged misrepresentation (Pet. App. A1-A2).

1. The decision below correctly held that the Tax Court did not abuse its discretion in refusing to dismiss the case in

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[3]Judge Scott subsequently denied petitioners' motion for reconsideration out of time or dismissal. That motion argued that petitioners should be afforded the opportunity to prove the falsity of the statement made by the Commissioner's attorney on February 15, 1978. Attached to the motion was an affidavit executed by Joseph Imhoff in which he stated that petitioners had not sought a continuance in accordance with the representation of the Commissioner's attorney.

petitioners' favor, and enter a decision of no deficiency.[4] Cf. *H.K. Porter Co.* v. *Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976); *Wilken* v. *Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972), cert. denied, 409 U.S. 1126 (1973); *Stickler* v. *Commissioner*, 464 F.2d 368, 369-370 (3d Cir. 1972). Judge Scott, to whom the case was reassigned for trial, was under no compulsion, legal or otherwise, to carry out the prior judge's oral admonitions regarding his stipulation order. It was fully within Judge Scott's discretion to decide, as she did, to determine the case on the merits, after affording petitioners a full trial where they had every opportunity to put into the record any evidence they had in support of their claimed deductions.

2. The alleged misrepresentation[5] did not constitute a fraud upon the court requiring the Tax Court's decision to be set aside. Assuming arguendo the truth of petitioners' allegation, we agree that obtaining a continuance with a deliberate factual misrepresentation would be inexcusable behavior by any officer of the court. *Birnholz* v. *United States*, 199 Ct. Cl. 532, 537 (1972). But, in order to constitute "fraud on the court" for purposes of setting aside the Tax Court's decision, the fraudulent conduct must have either improperly influenced the court in its decision (*Rozier* v. *Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978); *England* v. *Doyle*, 281 F.2d 304, 309 (9th Cir. 1960)), or "prevented the losing party from fully and fairly presenting his case or defense." *Toscano* v. *Commissioner*, 441 F.2d

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[4] A decision of the Tax Court dismissing the proceeding is considered a decision that the deficiency is in the amount determined by the Secretary. See Section 7459(d) of the Internal Revenue Code of 1954 (26 U.S.C.). What petitioners actually seek is a default judgment against the Commissioner, i.e., a determination of no deficiency.

[5] The Tax Court received no evidence and made no findings with regard to petitioners' allegations of willful misrepresentation.

930, 934 (9th Cir. 1971); *Luttrell* v. *United States*, 644 F.2d 1274, 1276 (9th Cir. 1980); *Pfizer, Inc.* v. *International Rectifier Corp.*, 538 F.2d 180, 195 (8th Cir. 1976).

3. *Hazel-Atlas* v. *Hartford Co.*, 322 U.S. 328 (1944), upon which petitioners rely (Pet. 6-9), is not to the contrary. There, this Court recognized the significant part that the fraudulent article played in influencing the court of appeals' decision holding the patent valid and infringed. As the Court stated (322 U.S. at 246): "Whether or not it was the primary basis for that ruling, the article did impress the Court, as shown by the Court's opinion." See also 322 U.S. at 241.[6]

Indeed, the definition from 7 J. Moore, *Moore's Federal Practice* para. 60.33, at 515 (1977), which was utilized by the court of appeals and cited by petitioner (Pet. 8), likewise stated:

> "Fraud upon the court" should, we believe, embrace only that species of fraud which does or attempts to defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery can

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[6]The Court in *Hazel-Atlas* also emphasized (322 U.S. at 249) that its holding was limited to the record presented, where the fraud was undisputed. As the Court noted (*id.* at n.5), "We do not hold, and would not hold, that the material questions of fact raised by the charges of fraud against Hartford could, if in dispute, be finally determined on ex parte affidavits without examination and cross-examination of witnesses."

Here, on the other hand, the charges of fraud have not been proven. The Commissioner was not given the opportunity to respond to the petitioners' factual allegations in the Tax Court, because the court did not view them as affecting the trial on the merits. Thus, petitioners' first two motions alleging the misrepresentation were made and denied orally in the course of the trial (A. 13-14, 16-18). Petitioners' final motion for reconsideration (A. 19-36) was filed on September 2, 1981, and denied by the court on September 3, 1981 (A. 19).

not perform in the usual manner its impartial task of adjuding cases that are presented for adjudication.

Kerwit Medical Products, Inc. v. *N. & H. Instruments, Inc.*, 616 F.2d 833, 837 (5th Cir. 1980); *Wilkin* v. *Sunbeam Corp.*, 466 F.2d 714, 717 (10th Cir. 1972), cert. denied, 409 U.S. 1126 (1973); *Kupferman* v. *Consolidated Research and Manufacturing Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972); *Kenner* v. *Commissioner*, 387 F.2d 689, 691 (7th Cir. 1968); *Great Coastal Express* v. *International Brotherhood of Teamsters*, 86 F.R.D. 131, 139 (E.D. Va. 1980).[7] Professor Moore's definition affirms that the fraud must affect the court in its decisional process. Here, there was no claim by petitioners that the alleged misrepresentation in any way prevented them from fully and fairly presenting their case, or in any way influenced the court in its decision.

Finally, the remedy ordered in *Hazel-Atlas*, in which the original judgment secured by Hartford was vacated, would under no circumstances be appropriate in this case. In *Hazel-Atlas*, the fraud perpetrated by Hartford went to the merits of Hartford's claim, i.e., it essentially nullified the validity of its patent, and, thus, its infringement claim. Here, to the contrary, the alleged fraud related to a procedural matter only and had no effect on the merits of the case. Indeed, it was established in a trial without substantive error that petitioners were not entitled to all the deductions claimed and that there is a deficiency in their tax. They have shown no basis for overturning that determination.

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[7]Although *H. K. Porter Co.* v. *Goodyear Tire & Rubber Co.*, 536 F.2d 1115, 1119 (6th Cir. 1976), refers only to dishonest conduct of attorneys, it cites *Kupferman* v. *Consolidated Research & Manufacturing Corp.*, *supra*, which in turn cites the above definition from Moore.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

JANUARY 1983

DOJ-1983-01

Office-Supreme Court, U.S.
FILED
FEB 18 1983
ALEXANDER L. STEVAS,
CLERK

No. 82-864

IN THE

Supreme Court of the United States

October Term, 1982

JOSEPH J. IMHOFF and ESTATE OF EDITH M. IMHOFF, Deceased, JOSEPH J. IMHOFF and AMERICAN SECURITY BANK, N.A., Co-Executors,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONERS

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PETITIONERS' REPLY BRIEF

1. Judge Scott Had a Duty to Investigate the Imhoffs' Allegation of Fraud.

The Commissioner misreads the petitioners' position when he asserts that Judge Scott was under no compulsion to carry out Judge Quealy's stipulation order (Memorandum in Opposition, p. 4). Indeed, Judge Scott was guilty of the same misunderstanding. Petitioners did not and do not now suggest that Judge Scott was bound to default the Commissioner simply because the Government's attorney had failed to prepare the stipulation as ordered by Judge Quealy. It was not the failure to prepare the stipulation but the lie told to cover that failure which petitioners base their request for relief upon. Had Mr. Stewart confessed his dereliction to Judge Quealy and had the judge, despite the dismissal promised in his order, decided to grant a continuance, petitioners would agree with the Commissioner. However, Mr. Stewart deliberately misinformed the court, and thus Judge Quealy's decision was the product of fraud and not an exercise of discretion to which Judge Scott might properly defer.

Review of the relevant portions of the record clearly show that Judge Scott did not first make a finding with regard to petitioners' fraud allegation and then reach her decision in light of that finding: Judge Scott simply refused to hear the matter. (Petition for a Writ of Certiorari, pp. A54-A55). The Commissioner attempts to turn this infirmity to his advantage by suggesting that the absence of findings weakens petitioners' position and distinguishes the case from *Hazel-Atlas v. Hartford Co.*, 322 U. S. 328 (1944) (Memorandum in Opposition, p. 4 n.5,

p. 5 n.6). Obviously, petitioners cannot be faulted for the refusal of the Tax Court, as well as of the Third Circuit Court of Appeals, to hear evidence and make findings.

2. The Commissioner Ignores the Interests of the Judiciary and the Public Where an Attorney's Fraud Is Concerned.

The Commissioner would give a strict reading to *Hazel-Atlas, supra,* by finding in it a requirement that the fraud influence the court in reaching its decision on the merits. The Court in that case specifically stated, however, in language immediately following that quoted by the Commissioner (Memorandum in Opposition, p. 5): "Doubtless it is wholly impossible accurately to appraise the influence that the article exerted on the judges. But we do not think the circumstances call for such an attempted appraisal." *Id.* at 274. The Court, it is plain, did not grant relief from the judgment in *Hazel-Atlas* based on a finding that the fraud influenced the outcome. This aspect of *Hazel-Atlas* was specifically noted by Professor Moore and led to his formulation of the legal standard for fraud upon the court, which includes all "fraud perpetrated by officers of the court," adopted by many of the Circuit Courts of Appeal.[1] 7 J. Moore, *Federal Practice* ¶ 60.33, at 513-15 (2d ed. 1982).

In *Hazel-Atlas, supra,* this Court noted that attorneys' fraudulent conduct implicates not only the interests of the parties, but also of the judiciary as an institution set up

1. As noted by the Commissioner (Memorandum in Opposition, p. 6 n.7), the Sixth Circuit Court of Appeals reads Moore's formulation precisely as do the petitioners. *H. K. Porter Co. v. Goodyear Tire & Rubber Co.,* 536 F. 2d 1115, 1119 (6th Cir. 1976) ("Since attorneys are officers of the court, their conduct, if dishonest, would constitute fraud on the court.").

to protect and safeguard the public. *Id.* 322 U. S. at 246. The instant case illustrates this principle clearly.

Judge Quealy, exercising his authority to manage his caseload and in an effort to move this case along expeditiously, set a trial date and ordered the parties to prepare a written stipulation before then. He ordered that no verbal stipulation would be accepted. Judge Quealy stated that there would be no trial without the written stipulation, because if he had to try cases "item by item and check by check . . . we'd never get our job done". (Petition for Writ of Certiorari, p. A44). Judge Quealy directed attorney Stewart to appear before him just prior to trial to confirm that the stipulation would be ready.[2] On February 21, 1978, the case was to either go to trial or be dismissed.

Instead, the Government's attorney, having failed to adhere to the court's established time-table, deliberately and by means of a knowing falsehood, frustrated Judge Quealy's attempt to direct this case's progress. The case was not tried or dismissed but was continued and remained on the court's docket for more than a year, during which time attorney Stewart's fraudulent act was concealed from petitioners.

This Court is all too familiar with the ever growing strain on the ability of the nation's courts to hear all those cases brought before them. Fraudulent conduct by an attorney which results in cases lingering on the court's docket when by right they should be dismissed is just as pernicious in its way as fabricated evidence.

The judicial system as an institution can properly function only if officers of the court abide by the system's rules. Lying and cheating cannot be tolerated, and no

2. Although Colonel Imhoff had made a specific request to also attend that conference, he was directed not to appear by Judge Quealy and was therefore not present.

judgment should stand when procured through means of counsel's dishonesty.

Respectfully submitted,

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